No. 95-118

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HYUNDAI MERCHANT MARINE CO., LTD.,

Petitioner,

—v.—

HYUNDAI CORP. U.S.A. AND INCHON IRON & STEEL CO., LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to this proceeding are Petitioner Hyundai Merchant Marine Co., Ltd. and Respondent Hyundai Corp., U.S.A.

Parent corporations of Petitioner Hyundai Merchant Marine Co., Ltd. are:

Hyundai Engineering & Construction Co. Ltd.
Hyundai Pipe Co. Ltd.
Kemkang Development Industrial Co. Ltd.
Koryeo Industrial Development Co. Ltd.
Hyundai Precision & Industry Co. Ltd.
Hyundai Motor Service Co., Ltd.

Non-wholly owned subsidiaries of Petitioner Hyundai Merchant Marine Co. Ltd. are:

None.

Parent corporation of Respondent Hyundai Corp., U.S.A. is:

Hyundai Corporation, Seoul Korea

Non-wholly owned subsidiaries of Respondent Hyundai Corp. U.S.A. are:

None.

Inchon Iron & Steel Co., Ltd. is not a party to these proceedings. (*See* Order and Judgment of June 26th, 1995 in Appendix to Petition for a Writ of Certiorari at 39a-40a.)

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Hyundai Corp., U.S.A. respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

REASONS FOR DENYING THE WRIT

The court below was faced with the question of which party authorized the issuance of the bill of lading for the shipment in question. After days of trial and listening to all the facts, the district court determined on the bases of six points of fact

that only one conclusion could be reached, that Petitioner, Hyundai Merchant Marine Co., Ltd. [hereinafter "Merchant Marine"], authorized the issuance of the bill of lading. Once the fact that Merchant Marine issued the bill of lading is accepted, all of the law cited in the district court's opinion falls into place. The bill of lading evidenced a contract of carriage of goods by sea from a port in the United States, in foreign trade, which was negotiated to a holder, namely Plaintiff-Respondent, Hyundai Corp., U.S.A. Therefore, U.S. COGSA applies as a matter of law. Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1301 (1975).

Both the time and voyage charter parties contained a Clause Paramount providing that U.S. COGSA governs bills of lading issued pursuant to the charter parties. Bill of Lading No. 1 was signed pursuant to the charter parties and, therefore, U.S. COGSA governs. (C.A. App. 280-81.)

At trial, Merchant Marine offered no evidence whatsoever from the Master to contradict the facts. There is no evidence that the broad authority given to the port agent was in any way limited or restricted.

The instant case was decided on the facts and is not in conflict with the decision of any other circuit. The factual decision was affirmed by the circuit court "substantially for the reasons set forth in the district court's opinion." (see Judgment Order of April 11, 1995 in Appendix to Petition for a Writ of Certiorari at 2a.) Findings of fact do not belong before this Court. *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Petitioner's point concerning due diligence to make the vessel seaworthy is a misinterpretation of the court's decision. If the district court's opinion is read correctly, there is no conflict with other circuits.

A. The Court of Appeals Decision That Petitioner Is a COGSA Carrier Is Not in Direct Conflict with Decisions of the First, Second, Fourth and Fifth Circuits.

Petitioner is correct in stating that COGSA defines a "carrier" as "the owner or the charterer who enters into a contract of carriage with the shipper." 46 U.S.C. § 1301(a).

Section 1301(a) defines a COGSA carrier as follows:

> The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

Both the vessel owner and the charterer may be held liable as carriers. *Joo Seng Hong Kong Co. v. S.S. UNIBULKFIR*, 483 F. Supp. 43 (S.D.N.Y. 1979); *Jordan Int'l Co. of Delaware v. M.V. CYCLADES*, 782 F. Supp. 25 (S.D.N.Y. 1992); *Aljassim v. SS SOUTH STAR*, 323 F. Supp. 918 (S.D.N.Y. 1971); *Thyssen Steel Caribbean, Inc. v. Palma Armadora S.A.*, 1984 A.M.C. 1133, 1141 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1441 (2d Cir. 1984); *see Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 978 F.2d 47, 50-51 (2d Cir. 1992).

Petitioner's statements, such as "[a]lthough Petitioner did not issue the bill of lading and was not in privity of contract of carriage with Respondents," (Pet. at 10), "if it did not issue the bill or if the party issuing the bill on its behalf lacked authority to do so," (Pet. at 13), and "[t]he Court, however, made no finding of fact, and there is no evidence in the record, that Petitioner authorized issuance of the bill of lading on its behalf," (Pet. at 15), are contrary to the findings of the district court. The court stated:

> While it is true that the bill of lading was not specifically signed by a representative of Merchant Marine, and certainly the bill is not on Merchant Marine's form, the following facts also came out at trial:

(1) Overseas was acting as Merchant Marine's agent at the port, though the scope of the agency relationship is not definite. Moreover Carolyn Comer, the Overseas representative, did not know on whose behalf the master signed the bill of lading;

(2) Clarendon did enter into a voyage charter party with Merchant Marine, and thus, the contract upon which the bill of lading was based was really with Merchant Marine;

(3) As found above, the bill of lading referenced and incorporated the voyage charter party;

(4) Payment of freight pursuant to the voyage party was contingent upon a bill of lading issued for the cargo;

(5) The Voyage Charter, by providing that "Ninety Percent (90%) of freight to be paid within 5 banking days after signing and releasing Bills of Lading Marked 'freight Paid as Per Charter Party'. . . ." "made provision for the possibility that [Merchant Marine] would authorize the bills of lading by signing or releasing them." *Samsung America Inc. v. M/T Fort Producer*, 798 F. Supp. 184, 187 (S.D.N.Y. 1992).

(6) Merchant Marine's port captain in New Jersey saw to the loading of the cargo, and in fact Merchant Marine continued monitoring and receiving reports about the transport of the cargo after the ship left New Jersey;

All these factors point to one conclusion: there is much evidence "tying [Merchant Marine] to the bill involved." *Joo Seng Hong Kong Co. Ltd. v. S.S. Unibulkfir*, 483 F. Supp. 43, 46 (S.D.N.Y. 1979); *Samsung*, 798 F. Supp. at 187. In other words, the evidence convinces me that Merchant Marine ***authorized*** the bill of lading.

(Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 18a-19a) (emphasis added).

A voyage or time charterer may become a COGSA carrier, if the charterer issues the bill of lading or directs another to issue the bill of lading on its behalf. *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278, 283 (S.D.N.Y. 1940), *aff'd*, 122 F.2d 266 (2d Cir. 1941).

The court found facts to support its contention that Merchant Marine authorized the bill of lading, therefore, all of Petitioner's arguments fail.

46 U.S.C. § 1302 of COGSA provides:

> [U]nder every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

B. Petitioner, as a COGSA Carrier, Did Not Exercise Due Diligence to Make the Vessel Seaworthy Before the Voyage Commenced.

Petitioner's argument that there was no finding by the court that Petitioner failed to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage is not correct. The court specifically stated in its opinion:

> Thus, in this case, there is a combination of sinking during expectable weather conditions and a series of factors independently evidencing unseaworthiness. Presumptively, then, Merchant Marine provided Hyundai with an unseaworthy vessel and the unseaworthiness was the proximate cause of the loss.
>
> In order to rebut this presumption, the carrier has the burden of proving that it exercised due diligence to make the ship seaworthy. See 46 U.S.C. § 1304; *Federazione*, 388 F.2d at 436. Merchant Marine attempts to rebut the presumption by pointing to the survey in Greece and the

> class certification. However, the carrier cannot meet this burden merely by producing certificates of classification. *Ionion Steamship Co. of Athens v. United Distillers*, 236 F.2d 78, 83 (5th Cir. 1956). Classification societies do not guaranty the seaworthiness of the ships that they classify. *Carbotrade SpA v. Bureau Veritas*, 1992 WL 367122 at *7 (S.D.N.Y. November 20, 1992). The duty of a classification society is merely to abide by their own rules and regulations in inspecting and classifying vessels in accordance with their own published standards. *Id.* Thus, the survey that led to the class certification is insufficient as a matter of law to rebut the presumption as well as the evidence of unseaworthiness adduced at trial.

(Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 20a-21a.)

The court's comment with respect to the incidents that happened after the voyage began merely confirmed the unseaworthiness condition that existed at the beginning of the voyage.

C. The Decision Below Does Not Destroy the Conformity of Maritime Law.

The district court found that Petitioner provided an unseaworthy vessel, Petitioner failed to exercise due diligence to make the vessel seaworthy before the voyage, and that because of the unseaworthy condition, the vessel sank. It held Petitioner liable under the bill of lading and COGSA. This is in conformity with well-established maritime law and is not contrary to any other circuit.

FURTHER ERRONEOUS COMMENTS IN PETITIONER'S BRIEF

On page 8, Petitioner stated: "Overseas received no authorization from Petitioner to sign the Bill of Lading, (C.A. App. 569-570), and the record contains no evidence that Petitioner directed the master to authorize Overseas to issue the bill of lading." This is contrary to the court's finding. Petitioner had appointed Overseas as its agent and there was no evidence of any limitation on the agency's authority. (*See* Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 18a.)

On page 8, Petitioner stated: "The vessel departed Long Beach on December 22, 1989, began taking on water forward on December 25th and sank six days later. The cause of the VULCA taking on water was never established. (14a-16a)." The district court found: "On December 25, however, the Master noted in the log that the ship was 'down by head'." (*See* Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 16a.) There is no evidence or conclusion as to when the vessel first started taking on water.

On page 11, Petitioner stated: "Moreover, the Court's ruling that under Section 3 of COGSA the carrier must exercise due diligence to make the ship seaworthy after commencement of the voyage irreconcilably conflicts with all reported decisions of other Circuits." The district court never stated that the carrier must exercise due diligence to make the ship seaworthy after commencement of the voyage.

On page 14, Petitioner stated: "In direct conflict with the First, Second, Fourth and Fifth Circuits, the Court below has held that a party's mere 'involvement' in the contract of carriage is sufficient to make that party a COGSA 'carrier.' " Nowhere in the district court's opinion was this held to be the case. *See supra* pp. 4-5.

On page 15, Petitioner stated: "The record is devoid of any evidence whatsoever that Petitioner issued the bill of lading, or instructed the VULCA's master or Overseas to issue bills of lading on Petitioner's behalf." The district court set forth in its finding six points of fact as to why it concluded that Petitioner authorized the issuance of the bill of lading.

On page 16, Petitioner stated: "Since Petitioner did not issue the bill of lading, or direct it to be issued, Petitioner cannot be a 'carrier' as defined by Section 1(a) of COGSA." The district court found in fact that Petitioner had authorized the bill of lading to be issued. *See supra* pp. 4-5.

On page 16, Petitioner stated: "The proper COGSA carrier, therefore, is the owner, Vulcan Navigation." (footnote omitted). There is no question that the Master bound the owner. The district court found that Petitioner authorized the bill of lading and this bound Petitioner as a COGSA carrier.

On page 17, Petitioner stated: "The time charterer, however, has no role in the navigation or cargo operations of the vessel." The district court found to the contrary. "(6) Merchant Marine's port captain in New Jersey saw to the loading of the cargo, and in fact Merchant Marine continued monitoring and receiving reports about the transport of the cargo after the ship left New Jersey;" (*See* Trial Opinion of September 2nd, 1994 in Appendix to Petition for a Writ of Certiorari at 18a.)

On page 17, Petitioner correctly stated: "If the time charterer books the cargo, and issues its own bill of lading, then the time charterer has knowingly made itself a party to the bill of lading and is properly liable as a COGSA carrier." This is a fact which the court found. Petitioner's continuation of the statement, "[b]ut no logic supports holding a time charterer who does not issue a bill of lading liable for cargo damage caused by operational, mechanical, or navigational faults of the vessel or those who man her," is not relevant.

On page 18, Petitioner stated that the instant case would "disrupt the international uniformity now achieved and undermine the purposes of the international convention." It would only be so if the facts of the case were contrary to the findings of the district court.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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